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State Water Resources Control Board
Division of Water Rights
Attn: Mark Gowdy
P.O. Box 2000
Sacramento, CA 95812

Dear Mr. Gowdy,

In a recent letter dated May 6, 2014 to the San Francisco Public Utilities Commission ("SFPUC"), the Division of Water Rights outlined certain "key assumptions" that State Water Resources Control Board ("State Water Board") staff will use in their impact analysis for the revised *Draft Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the Bay-Delta: San Joaquin River Flows and Southern Delta Water Quality* ("Phase 1 SED"), to evaluate impacts to the City and County of San Francisco ("CCSF") that may result from the proposed Tuolumne River flow alternatives.¹ The purpose of this letter is to comment on the propriety of staff's reliance on the "key assumptions" identified in the May 6, 2014 letter.²

The May 6, 2014 letter identifies assumptions by State Water Board staff ("staff") regarding how CCSF will fulfill its obligations under the Raker Act and the Fourth Agreement to the Modesto Irrigation District and the Turlock Irrigation District ("Districts") as a result of new instream flow requirements on the Tuolumne River if the CCSF's storage credits in its Water Bank account in the Don Pedro Project are reduced to zero. In this scenario, staff will assume that economic impacts to CCSF from increased instream flow requirements will be limited to those arising from increased water rates because CCSF will be able to purchase sufficient water from the Districts to avoid water shortages and consequent reductions in water deliveries throughout the Hetch Hetchy Regional Water System ("RWS") service territory.

¹ Letter from Barbara Evoy, Deputy Director, Division of Water Rights, State Water Resources Control Board, to Ellen Levin, Deputy Manager, Water Enterprise, San Francisco Public Utilities Commission, May 6, 2014 (referred to below as the "May 6, 2014 letter" or "letter"). The State Water Board also filed the letter in the Federal Energy Regulatory Commission ("FERC") docket for the Don Pedro Hydroelectric Project, FERC No. 2299 ("Don Pedro Project"), on May 12, 2014. The letter is available through the FERC eLibrary under Accession Number 20140513-0028.

² CCSF reserves the right to argue how the Raker Act or the Fourth Agreement should be interpreted in future proceedings before the State Water Board or other bodies.

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I. The Phase 1 SED Must Analyze Impacts from Reduced Water Deliveries throughout the Hetch Hetchy Regional Water System as a Result of Implementation of the Proposed Tuolumne River Flow Alternatives Because Reduction in Deliveries is the Reasonably Foreseeable Method of Compliance.

The May 6, 2014 letter suggests that the Phase 1 SED may not include analysis of the impacts from reduced water deliveries throughout the RWS service territory that may result from implementation of the proposed Tuolumne River flow alternatives. Such an omission would render staff's California Environmental Quality Act ("CEQA") impact analysis inadequate.

The Phase 1 SED must analyze the impacts of reduction in deliveries throughout the RWS service territory that may result from implementation of the proposed Tuolumne River flow alternatives because reduction in deliveries is the only method of compliance that is within the SFPUC's control, and thus, it is the reasonably foreseeable consequence of the State Water Board's contemplated action. The Phase 1 SED must contain "[a]n environmental analysis of the reasonably foreseeable methods of compliance . . ."³ As explained by the California Court of Appeal, under CEQA whether one or more methods of future compliance with a new regulatory requirement are reasonably foreseeable "depends upon the quality and quantity of evidence in the administrative record."⁴ Evidence introduced into the administrative record for the Phase 1 SED by CCSF shows that the foreseeable method of compliance with the proposed Tuolumne River flow alternatives will be reduction in water deliveries throughout the RWS service territory.⁵ More specifically, CCSF submitted comments on the Draft SED for Phase 1 in which it explained that,

SFPUC's analysis of the proposed action [*i.e.*, the preferred alternative which would require 35% of unimpaired flow to remain in the stream] shows there would be dramatic and significant impacts on the SFPUC's diversions from the Hetch Hetchy Project to its Regional Water System service area and the Bay Area economy assuming – as the draft SED recognizes – that revised water release requirements ordered by FERC could result under the Fourth Agreement in a reallocation of water bank credits so as to apportion an additional burden on CCSF of 51.7121%. Assuming current demands and a recurrence of the 1987-1992 drought, the SFPUC's annual diversions from the Tuolumne River could be reduced by 111,700 [acre-feet] for each of the six years of the drought. This additional annual reduction in supply – when added

³ 23 CCR § 3777 (b)(4) (identifying required elements of Substitute Environmental Documentation ("SED") prepared by the State Water Board, and specifying that "[t]he Draft SED shall include, at a minimum, the following information . . . An environmental analysis of the reasonably foreseeable methods of compliance.").

⁴ *Cnty. Sanitation Dist. No. 2 of Los Angeles Cnty. v. Cnty. of Kern* ("County Sanitation District") (2005) 127 Cal. App. 4th 1544, 1586.

⁵ Comment Letter – Bay Delta Plan SED, CCSF, March 29, 2013, available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/baydelta_pdsed/docs/comments032913/dennis_herrera.pdf (referred to below as "CCSF Comment Letter"), at pp. 6-7.

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to reductions in deliveries of up to 20% already imposed by the SFPUC to ensure delivery of water to customers throughout the 1987-1992 drought – results in a single year of reduction in deliveries of 42%, and five years of reduction in deliveries of 52%. In 2009 the SFPUC presented testimony to FERC on the economic impacts of 41% and 51% rationing within the service area of the Regional Water System. . . . *The impacts of such levels of rationing on the Bay Area economy are staggering.*⁶

Thus, CCSF's predicted method of compliance with the proposed Tuolumne River flow alternatives, *i.e.*, reduction in deliveries throughout the RWS service territory, and the information upon which the prediction is based, *e.g.*, the analyses of CCSF's experts, Mr. Steiner and Professor Sunding, constitute substantial evidence which supports a fair argument that reduction in deliveries to the RWS service territory is a reasonably foreseeable consequence of the SWB's proposed action.⁷ Therefore, staff's impact analysis in the Phase 1 SED must consider reduction in deliveries to the RWS service territory and the impacts that would result from such reductions.

In particular, staff's analysis must consider direct and indirect physical impacts on the environment from reduction in deliveries to the RWS service territory. (*Bakersfield Citizens for Local Control v. City of Bakersfield* ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1205 (explaining, "if the forecasted economic or social effects of a proposed project directly or indirectly will lead to adverse physical changes in the environment, then CEQA requires disclosure and analysis of these resulting physical impacts.")) A reasonable analysis should evaluate the physical impacts associated with insufficient water supplies and rationing. These types of analyses should be undertaken to provide the decision makers with a full understanding of the environmental consequences of their decision, as required by CEQA.

II. The Phase 1 SED Should Not Analyze CCSF's Purchase of the Required Water from the Districts Because it is Not Reasonably Foreseeable that CCSF and the Districts Would be Able to Effectuate Such a Water Transfer.

Under staff's assumption that CCSF would be able to purchase the requisite volume of water from the Districts, the economic impacts to CCSF from increased instream flow requirements will be limited to rate impacts of the additional cost of purchasing such water:

⁶ *Id.* at pp. 6-7 (italics added) (citing Attachment C to CCSF Comment Letter, *CCSF Exposure to SWRCB 35 Percent February-June Flow Requirement*, Daniel B. Steiner, Consulting Engineer; Attachment D to CCSF Comment Letter, *Answering Testimony of David L. Sunding on Behalf of San Francisco Public Utilities Commission Before the Federal Energy Regulatory Commission (Turlock Irrigation District and Modesto Irrigation District, Project No. 2299 (Don Pedro Project), September 2009)*).

⁷ *County Sanitation District*, 127 Cal. App. 4th at 1587 (wherein the Court of Appeal concluded that predicted methods of compliance with new regulatory requirements, and the information upon which the predictions are based, "constitute substantial evidence supporting a fair argument" that the predicted methods of compliance are "reasonably foreseeable alternatives" that must be analyzed under CEQA).

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For purposes of the Phase 1 SED analysis . . . staff believes it is reasonable to evaluate CCSF's purchase of the required water from the Districts. The Phase 1 SED, therefore, will evaluate economic impacts by assuming a purchase price for this water from the Districts and then estimate the corresponding increase in water rates in the SFPUC service area and associated indirect and induced impacts in the regional economy. The corresponding fiscal benefit to the Districts of these water sales will also be evaluated.⁸

It is not reasonably foreseeable that CCSF and the Districts would be able to effectuate such a water transfer for at least three reasons. First, there is no agreement between CCSF and the Modesto Irrigation District (MID) or Turlock Irrigation District (TID) that would enable CCSF to purchase the required volume of water from either of the Districts. The most recent effort to transfer a relatively small amount of water – 2 million gallons per day (“MGD”) – from MID to CCSF met with significant opposition and the parties were unable to reach agreement.⁹ CCSF also pursued a 2 MGD water transfer with Oakdale Irrigation District (“OID”) that would have required a transfer between OID and MID, but the parties were unable to reach agreement to effectuate the transfer, even though the water in question would have come from OID and not MID.¹⁰

Second, even if such a water transfer could be agreed upon, neither MID nor TID has ever transferred the volume of water that CCSF may be required to contribute under the proposed Tuolumne River flow alternatives. Under the “key assumptions” that the May 6, 2014 letter states staff will use, the preferred alternative analyzed in the Draft SED would require purchase of 111,700 acre-feet (“AF”) for each of the six years of the drought. On average, 85 percent of RWS supplies come from the Tuolumne River watershed. At recent delivery rates this amounts to approximately 222,510 AF/year. Thus, to replace the forecasted shortage amount of 111,700 AF/year, CCSF would need to obtain more than half of the water that it currently diverts from the Tuolumne River for each of six consecutive drought years. Neither MID nor TID has ever transferred that much water to any other entity, and thus, it is not reasonably foreseeable that they would do so during a severe and prolonged drought. Indeed, it is unclear whether the requisite volume of water – over 100,000 AF – would be available for transfer by the Districts in any water year type, let alone a dry or critically dry year.

⁸ May 6, 2014 letter, *supra* note 1, at p. 1.

⁹ See *e.g.*, Holland, “Modesto Irrigation District kills proposed water sale,” Modesto Bee (September 18, 2012) available at <http://www.modbee.com/2012/09/18/2378903/modesto-irrigation-district-kills.html> (explaining that MID voted to cease negotiations with CCSF regarding the proposed 2 MGD water transfer). See also *Closed Session Resolution No. 2012-07 Directing Staff and General Counsel to Discontinue Further Negotiations Regarding the Proposed Sale of Water to the City and County of San Francisco*, Modesto Irrigation District, September 18, 2012, included hereto as Attachment 1.

¹⁰ Stapley, “Modesto Irrigation District blocks Oakdale water sale to SF, for now,” The Modesto Bee (January 23, 2014) available at <http://www.modbee.com/2014/01/23/3150103/modesto-irrigation-district-not.html>.

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Third, staff's proposed impact analysis will be based on an assumed purchase price for water to be sold by the Districts to CCSF, without any reasonable basis for determining such a price. Since the hypothetical water transfer proposed by staff is neither based on any existing agreement, nor remotely comparable in scale to any completed or contemplated water transfer by either of the Districts, a purchase price for that water cannot be predicted with any reasonable assurance of accuracy. Staff nevertheless appears to envision that this speculative, assumed purchase price will be the basis for its evaluation of impacts to CCSF from the proposed Tuolumne River flow alternatives, *i.e.*, impacts that would result from rate increases to account for the additional costs borne by CCSF to purchase the required water.

Staff's assumption that it will be feasible for CCSF to purchase the required volume of water from the Districts at staff's assumed purchase price must be supported by substantial evidence in the administrative record. (*Bakersfield*, 124 Cal. App. 4th at 1198 (explaining, "[t]he substantial evidence standard is applied to conclusions, findings and determinations.")) Argument, speculation, unsubstantiated opinion or narrative, and evidence which is clearly inaccurate or erroneous is not substantial evidence. (Cal. Pub. Res. Code § 21082.2(c); 14 CCR § 15384(a).) In the May 16, 2014 letter, staff indicates, but fails to identify, the bases for its assumptions.¹¹ If staff is unable to support its assumptions regarding the feasibility of CCSF purchasing the requisite volume of water from the Districts at staff's assumed purchase price with substantial evidence, then the State Water Board will be unable to rely upon any analysis based on such assumptions in the Phase 1 SED.

Thank you for the opportunity to comment on the May 6, 2014 letter.

Very truly yours,

DENNIS J. HERRERA
City Attorney

/s/

Jonathan P. Knapp
Deputy City Attorney

Enclosure

¹¹ May 6, 2014 letter, *supra* note 1, at p. 2.

Attachment 1

CLOSED SESSION RESOLUTION NO. 2012-07
DIRECTING STAFF AND GENERAL COUNSEL TO DISCONTINUE
FURTHER NEGOTIATIONS REGARDING THE PROPOSED SALE
OF WATER TO THE CITY AND COUNTY OF SAN FRANCISCO

BE IT RESOLVED, That based on information received from the City and County of San Francisco, the Board of Directors of the Modesto Irrigation District directed staff and General Counsel to discontinue further negotiations regarding the proposed sale of water to the City and County of San Francisco.

Moved by Director Byrd, seconded by Director Warda, that the foregoing resolution be adopted.

The following vote was had:

Ayes: Directors Blom, Byrd, Van Groningen, Warda and Wild

Noes: Directors None

Absent: Directors None

The President declared the resolution adopted.

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I, Pat Mills, Secretary of the Board of Directors of the Modesto Irrigation District, do hereby CERTIFY that the foregoing is a full, true and correct copy of a closed session resolution duly adopted at a special meeting of said Board of Directors held the 18th day of September 2012.



Secretary of the Board of Directors
of the Modesto Irrigation District